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84-1168

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

Caridad Valdes Aguilar,
Petitioner,

v.

The State of Texas,
Respondent.

On Writ Of Certiorari To The
Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

Samuel A. Guiberson,
for Petitioner

2211 Norfolk, Ste. 810
Houston, Texas 77098
(713) 520-7200

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QUESTION PRESENTED

Whether the Petitioner was denied her rights under the Fourteenth Amendment of the Constitution of the United States in that viewing the evidence introduced at trial in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Caridad Valdes Aguilar, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals entered in the above-entitled case on October 31, 1984.

OPINIONS BELOW

The opinion of the Texas Court of Appeals - Tenth Supreme Judicial District is printed in Appendix A attached hereto. The Texas Court of Criminal Appeals did not issue any opinions either upon discretionary review or denial of rehearing: a copy of the Court's notification to Counsel in both instances are printed in Appendix A attached hereto. The Journal Entry of Judgment of the 174th Judicial District Court is printed in Appendix A attached hereto.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257 (3), petitioner having asserted below and asserting her deprivation of rights secured by the Constitution of the United States. The judgment of the 174th Judicial District Court (Appendix A) was entered on June 2, 1982. The opinion of the Texas Court of Appeals for the Tenth Supreme Judicial District (Appendix A) was rendered on November 30, 1983. On May 23, 1984, the Texas Court of Criminal Appeals (Appendix A) refused to grant petitioner's Petition for

Discretionary Review. Rehearing was denied by the Texas Court of Criminal Appeals (Appendix A) on October 31, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves the following provisions of Texas law:

> TEXAS CODE OF CRIMINAL PROCEDURE, Article 38.03:
>
> > All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.
>
> TEXAS CONTROLLED SUBSTANCES ACT, Art. 4476-15, Section 4.05 (a):
>
> > (a) person commits an offense if he knowingly or intentionally possesses a usable quantity of marihuana.
>
> TEXAS PENAL CODE, Section 1.07 (8):
>
> > "Conduct" means an act or omission and its accompanying mental state.

TEXAS PENAL CODE, Section 1.07 (28):

> "Possession" means actual care, custody, control, or management.

TEXAS PENAL CODE, Section 6.01:

> (a) A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.
>
> (b) Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.

STATEMENT OF CASE

The State, pursuant to Bill of Indictment No. 342190 issuing for the Grand Jury of Harris County, Texas, instituted proceedings against Petitioner in the 174th Criminal District Court of Harris County, Texas, for the offense of possession of marihuana. Petitioner was found guilty by the court, judgment was entered on the verdict, and Petitioner was sentenced to confinement in the Texas Department of Corrections for a period of six years, whereupon Petitioner instituted this appeal.

On review by the Texas Court of Appeals for the Tenth Supreme Judicial District, the court found the evidence sufficient to sustain Petitioner's conviction for

possession of marihuana. In arriving at this decision, the court decided the question of law contrary to numerous decisions of the Texas Court of Criminal Appeals and the Supreme Court of the United States.

The Texas Court of Appeals, in its two and a half page opinion, held that Petitioner was in exclusive possession of the contraband at the time of her arrest. Petitioner's knowledge of and control over the contraband were demonstrated exclusively by a showing that there was a large amount of marihuana (148 pounds) present in the apartment where Petitioner was arrested, and that upon opening the closet in which the marihuana was stored there was a detectable odor. (Appendix A). The Texas court concluded that the above two facts were sufficient independent facts to link Petitioner to the contraband.

The Texas court's reasoning is directly and obviously in conflict with those appellate court decisions which the court itself cites to substantiate its decision in the instant case. Pollan v. State, 612 S.W.2d 594 (Tex.Cr.App. 1981); Barry v. State, 629 S.W.2d 84 (Tex.Ct.App.—Dallas 1981, disc.rev.ref.).

TREATMENT OF THE FEDERAL QUESTIONS BY THE STATE COURTS BELOW

At her trial before the 174th Judicial District Court of Harris County, Texas, Petitioner moved for the trial court to enter a judgment of acquittal on the basis of insufficient evidence to link Petitioner to the contraband (Tr.52). The trial court denied Petitioner's request and Petitioner requested that her motion and the court's ruling thereon be noted for the record. Petitioner argued that the trial court's failure to enter the judgment of acquittal denied her due process under the Fourteenth Amendment as interpreted by this Court in In re Winship, 397 U.S. 358 (1970) and Jackson v. Virginia, 443 U.S. 307 (1979).

In her brief before the Texas Court of Appeals, Petitioner contended that the trial court's failure to grant her motion for directed verdict on the basis of insufficient evidence violated her right to due process under the Fourteenth Amendment as interpreted by the Texas Court of Criminal Appeals in Culmore v. State, 447 S.W.2d 915 (Tex. Cr. App. 1969), as well as this Court's interpretation of that right in the Jackson and Winship.

The Texas Court of Appeals for the Tenth Supreme Judicial District expressly rejected Petitioner's contention, holding that the trial court's refusal to grant a directed verdict did not violate Petitioner's right to due process under the Fourteenth Amendment as set out in the above-referenced cases.

REASON FOR GRANTING WRIT

I. Writ of Certiorari Should be Granted to Consider Whether Petitioner's Fourteenth Amendment Right of Due Process was Denied, in that Viewing the Evidence Introduced at Trial in the Light most Favorable to the Prosecution, No Rational Trier of Fact Could Have Found the Essential Elements of the Crime Beyond a Reasonable Doubt.

This case presents again for this Court's determination the question of whether an individual's due process rights under the Fourteenth Amendment are violated by a conviction based upon insufficient evidence. Specifically the question here is whether, viewing the evidence introduced at Petitioner's trial in the light most favorable to the prosecution, any reasonable trier of fact could have found the essential elements of possession of marihuana beyond a reasonable doubt.

The courts below held that that Petitioner was in exclusive possession of the contraband at the time of her arrest. Apparently the courts below concluded that Petitioner's knowledge of and control over the contraband were demonstrated exclusively by a showing that there was a large amount of marihuana (148 pounds) present in the apartment where Petitioner was arrested. (Appendix A). The courts below concluded that this was a sufficient independent fact to link Petitioner to the contraband.

Initially we point out that the analyses of the courts below were seriously deficient. In the brief filed by Petitioner with the Texas Court of Appeals on April 14, 1983, she alleged in her second ground of error that the evidence was insufficient to sustain her conviction. Petitioner argued that the State failed to offer a shred of direct evidence demonstrating Petitioner's possession of the alleged contraband. Rather, the theory of guilt proposed by the State consisted entirely of circumstantial evidence linking Petitioner to the contraband. When this "evidence" is measured against the legal standards the court uses to review possession cases based entirely upon circumstantial evidence, the insufficiency of the proof is

obvious. As a matter of law, this conviction should be reversed and dismissed.

Petitioner was indicted for the offense of possession of marihuana under TEXAS CONTROLLED SUBSTANCES ACT, Art. 4476-15, Section 4.051(a). This statute provides that "(a) person commits an offense if he knowingly or intentionally possesses a usable quantity of marihuana." Specifically, the indictment alleged that Petitioner "intentionally and knowingly possess(ed) marihuana in a usable quantity of more than fifty pounds."(R.10).

Cases construing Art. 4476-15, Section 4.051 (a) of the TEXAS CONTROLLED SUBSTANCES ACT have repeatedly emphasized that the essential elements of the offense of possession of marihuana are: (1) that the accused exercised care, control, and management over the contraband, and (2) that the accused knew the substance possessed was a controlled substance. Dubry v. State, 582 S.W.2d 841 (Tex.Cr.App. 1979); Naquin v. State, 607 S.W.2d 583 (Tex.Cr.App. 1980); Pierce v. State, 577 S.W.2d 253 (Tex.Cr.App. 1979); Herrera v. State, 561

S.W.2d 175 (Tex.Cr.App. 1978).[1/] A closely related rule of equal strength is that where the evidence fails to show that the person named in the indictment was in exclusive control of the place where the controlled substance was found, absent additional independent facts and circumstances affirmatively linking the person to the contraband, the evidence is insufficient to support the indictment, and the conviction must be reversed and dismissed. Wiersing v. State, 571 S.W.2d 188 (Tex.Cr.App. 1978); Barry v. State, 629 S.W.2d 84 (Tex.Ct.App. 1981, Disc. Rev. ref.).

The union of these two rules with the indictment in the instant appeal reveals the precise factual thesis that

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[1/] Appellant's research reveals that the unique character of "possessory" offenses has always been confusing to the courts, for it defies analysis by the general methodology of viewing the major components of offenses as "conduct" distinct from "intent." Under the 1979 Penal Code, however, culpable "conduct" can be either an "omission" or an "act." V.T.C.A. Penal Code, Section 1.07(8). In turn, a culpable "act" must be either a voluntary bodily movement, voluntary speech, or voluntary "possession," the latter of which in turn means "actual care, custody, control, or management," of a prohibited substance or object. V.T.C.A. Penal Code, Sections 1.07(1)(28), 6.01(a)(b).

had to be proven in order for the courts below to find the evidence sufficient: Petitioner had to be identified as the person who actually possessed or was affirmatively linked to the controlled substance. A review of the record indicates that the State's evidence, either standing alone or taken as a whole, fails to affirmatively link Petitioner to the contraband.

A. At Trial, the State Relied Upon Circumstantial Evidence To Establish Petitioner's Possession Of The Controlled Substance.

While possession of contraband need not be exclusive, a finding of joint possession cannot be justified solely on the basis of proof of mere presence at a place where contraband is possessed. Hernandez v. State, 538 S.W.2d 127 (Tex.Cr.App. 1976); Hausman v. State, 480 S.W.2d 721 (Tex.Cr.App. 1972). Irrespective of whether the theory of prosecution is sole or joint possession, the evidence must affirmatively link the accused to the contraband in such a manner and to such an extent that a reasonable inference may arise that the accused knew of the contraband's existence and of its whereabouts. An affirmative link may be established by showing additional facts and circumstances which indicate the accused's

control and knowledge of the contraband.[2/] Hernandez, 538 S.W.2d at 130.

In Hernandez, 538 S.W.2d at 130, it was observed that,

> (p)ossession means more than being where the action is; it involves the exercise of dominion and control over the thing allegedly possessed.

Absent direct evidence of Petitioner's knowledge and control of the contraband, possession, if any, must be proved by circumstantial evidence. Pierce v. State, 577 S.W.2d at 255; Presswood v. State, 548 S.W.2d 398 (Tex.Cr.App. 1977); Abercrombie v. State, 528 S.W.2d 578 (Tex.Cr.App. 1974); cf. Harris v. State, 486 S.W.2d 88 (Tex.Cr.App. 1972).

The courts below erred in their finding of an

[2/] As the words "actual care, custody, control or management," indicate, the "voluntary act" of "possession" necessarily presupposes that "the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for sufficient time to permit him to terminate his control." V.T.C.A. Penal Code, section 6.01(b). Indeed, the dictionary definitions of "care," "custody," "control," and "management" all reflect that such are "states of being" which involve an awareness of the "state," instead of identifiable "bodily movements." Webster's New Collegiate Dictionary (1977); Webster's Seventh New Collegiate Dictionary (1969).

affirmative link to show Petitioner's knowlege and control of the contraband. Chief Justice McDonald, writing for the Texas Court of Appeals in Petitioner's opinion cited the cases of Pollan v. State, 612 S.W.2d 594 (1981), and Barry v. State, 629 S.W.2d 84 (Tex.Ct.App.—Dallas 1981, disc.rev.ref.), to support the court's holding. The court interpreted the two previously cited cases as holding that a large amount of contraband having been found in the apartment and the odor of marihuana having been detected upon opening the door to the closet in which the marihuana was found are both sufficient independent facts to link Petitioner to the contraband.

The Texas Court of Appeals, by its own admission, states in its summary of the facts in Petitioner's case that the marihuana was found in the closet of one bedroom, while Petitioner was found in the living room. (Appendix A). Further the court states that the police officer conducting the search of the apartment testified that he detected the odor of marihuana only upon opening the closed closet door. (Appendix A). Therefore, by the court's own admission, the contraband was not in plain view, nor was the odor of the marihuana detectable

throughout the apartment, and Petitioner was not shown to be living at the residence.

In Dubry v. State, 582 S.W.2d 841 (Tex.Cr.App. 1979) the first case cited by the court, calls for a different result then that reached in this case when its facts and law are applied. The Appellants in Dubry were charged with possession of 1300 pounds of marihuana found in an airplane. The case reveals that both Appellants were arrested some distance from the plane. In finding that the evidence was insufficient to prove possession, Judge Dally writing for the Texas Court of Criminal Appeals, noted that there was only a trace of marihuana found on one Appellant, and none on the other Appellant. There was no evidence regarding the amount of marihuana found when sweepings were taken from the truck to which one of the Appellant's had a key. The marihuana in question was not located in a vehicle or on premises owned or controlled by Appellants. Appellants were not seen loading, unloading, or otherwise handling the marihuana. Id. at 844. The Texas Court of Criminal Appeals concluded:

> While the evidence strongly suggests that the appellants knew that the marihuana was at the airport, there is little, if any, evidence affirmatively linking appellants to the marihuana to such an extent that it may be inferred that they exercised care, custody, control, or management over the marihuana. Id. at 844.

In Collini v. State, 487 S.W.2d 132 (Tex.Cr.App. 1972), a search warrant was executed for the defendant's apartment at a particular residence. No contraband was found in Collini's apartment. No contraband was found upon Collini's person. The contraband was found outside the residence in a hole in the sidewalk near the garage. Id. at 136. The residence was later determined to be home to a number of individuals. Ultimately, the evidence was found to be insufficient to support Collini's conviction, and the judgment was reversed.

The record in the instant case clearly and obviously demonstrates that there is no direct evidence that Petitioner was observed in personal possession of the marihuana found in the apartment. The record fails to show who owned, possessed, or occupied the residence searched. There is no evidence that any contraband was found on Petitioner's person or that Petitioner had used

or was under the influence of the contraband. There is no evidence that Petitioner owned or rented the apartment, paid utility bills for the apartment, nor was any clothing or property indicating Petitioner lived at the apartment found there. There is no evidence of how long Petitioner had been on the premises or that she had ever been there on any other occasion.

Petitioner was in the living room of the apartment where no contraband was found. The contraband was discovered in a bedroom closet. Both police officers who executed the search warrant in this case testified at trial. Neither officer testified that at any time on the date in question did he personally observe Petitioner to be in possession of the contraband. Officer Oatis testified that the marihuana was discovered in the back bedroom closet. During direct examination by the State, Officer Oatis testified that the he recovered "a number of bags with green leafy substance in it." (Tr. 38). Officer Oatis stated that he could only detect the odor of marihuana "once you opened the closet door". (Tr. 38).

B. The Circumstantial Evidence Cited By The Courts Below Is Insufficient Because It Fails To Affirmatively Link Petitioner With The Controlled Substance.

Before being recently amended Article 38.03, V.A.C.C.P., provided in pertinent part that an accused "is presumed to be innocent until his guilt is established beyond a reasonable doubt..." In a circumstantial evidence case, that presumption is given effect by an appellate court in ascertaining whether guilt has been established to a moral certainty by refusing to "presume any acts against the accused that are not shown to have been committed by him," 37 Tex.Jur.2d 424-425, Evidence, Section 742, quoted approvingly and applied by the Court of Criminal Appeals in the leading opinion of Culmore v. State, 447 S.W.2d 915 (Tex.Cr.App. 1969).[3/] Thus, as Culmore pointed out, in Arsiaga v. State, 372

3/ The court updated the authorities that built, e.g., on Culmore to confirm rules for examining a conviction based upon circumstantial evidence, and with those rules in mind, concluded that "while the circumstances...lead to a strong suspicion or probability that the appellant committed the murder, it does not exclude to a moral certainty every other reasonable hypothesis except appellant's guilt as required by the law of circumstantial evidence," Nathan v. State, 611 S.W.2d 69, (Tex.Cr.App. 1981).

S.W.2d 538 (Tex.Cr.App. 1963), the Court expressed "serious doubt" that circumstantial evidence was sufficient "where the accused was shown to be in position to have come in contact with the contraband, but the State was unable to show that he had ever had the same in his control and custody." This "standard for appellate review" was recently reaffirmed by this Court in Wilson v. State, 634 S.W.2d 465 (Tex.Cr.App. 1983). Judge Clinton writing for the Texas Court of Criminal Appeals stated:

> ...we are unable to devise or discover any reason, compelling or otherwise, for abandoning the utilitarian 'exclusion of outstanding reasonable hypotheses' analysis for applying the above 'standard for review' in circumstantial evidence cases. By the nature of circumstantial evidence, in order to determine if it rationally establishes guilt beyond a reasonable doubt, a process of elimination must be used. Id. at 471.

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358, 364 (1970). In Winship, the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a

defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. 358, 364 (1970).

The standard of proof beyond a reasonable doubt, said the Court, "plays a vital role in the American scheme of criminal procedure," because it operates to give "concrete substance" to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. 397 U.S. 358 363 (1970). At the same time by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. 397 U.S. at 372, (Harlan, J., concurring).

The constitutional standard recognized in the Winship case was expressly phrased as one that protects an accused against a conviction except on "proof beyond a reasonable doubt . . . ." In subsequent cases discussing the reasonable doubt standard, this Court has never departed from this definition of the rule or from the

Winship understanding of the central purposes it serves. See, e.g., Jackson v. Virginia, 443 U.S. 307 (1979); Ivan V. v. City of New York, 407 U.S. 203, 204 (1972); Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977); Cool v. United States, 409 U.S. 100 (1972).

In short, Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." Woodby v. INS, 385 U.S. 276, 282

(1966). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Johnson v. Louisiana, 406 U.S. 356, 362 (1972). This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

In the instant case, Petitioner was shown to be present in the same apartment where the contraband was discovered, but at trial the State did not show she ever actually possessed the contraband. Acts must be presumed against Petitioner for the courts below to

conclude as they do that the controlled substance was under the care, custody and control of Petitioner. That will not do for again as stated by the Texas Court of Criminal Appeals in Culmore, 447 S.W.2d 915 (Tex.Cr.App. 1969):

> A conviction on circumstantial evidence cannot be sustained on proof amounting only to a strong suspicion or mere probability. Such proof does not exclude every other reasonable hypothesis except that of guilt of the accused. Id., at 917.

In a circumstantial evidence case such as this, the affirmative link demonstrating the accused's possession of the contraband can be established by showing additional facts and circumstances which indicate the accused's knowledge and control of the contraband. Norman v. State, 588 S.W.2d 340 (Tex.Cr.App. 1979). Among such additional facts which can establish the affirmative link are: the marihuana was in open or plain view, Hernandez v. State, 538 S.W.2d 127 (Tex.Cr.App. 1976); the place where the contraband was found was enclosed, Mendoza v. State, 583 S.W.2d 396 (Tex.Cr.App. 1979); when the marihuana was found there was sufficient light for a person to see that marihuana, Hernandez v.

State, 538 S.W.2d 127 (Tex.Cr.App. 1976); the amount of marihuana found, Carvajal v. State, 529 S.W.2d 517 (Tex.Cr.App. 1975); the narcotic was conveniently accessible to the accused, Hahn v. State, 502 S.W.2d 724 (Tex.Cr.App. 1973); and the accused's action toward the contraband may show his intent to violate the statute, Alaniz v. State, 458 S.W.2d 813 (Tex.Cr.App. 1970).

Accordingly, Petitioner moves this Court to assay the incriminating circumstances adduced and omitted at trial, and reviewed by the courts below. The record reflects that Petitioner was present at the West Parker address when the search was conducted. The marihuana, discovered by police during the search of the apartment, was located in the closet of the back bedroom. The closet door was closed. Therefore, the marihuana was not in plain view. Further evidence negating the fact that the marihuana was in plain view was testimony by the officers conducting the search that the marihuana was wrapped in green opaque containers. Although one of the officers testified that he smelled the odor of marihuana, he testified that the odor was only detectable upon opening the closed closet door. There was no

evidence that Petitioner lived at the West Parker address or had ready access to the apartment's contents.

Without any doubt, Petitioner accepts the obvious: Petitioner was present in the apartment where the controlled substance was found. However, only a strong suspicion or mere probability would suggest that Petitioner knew there was contraband in the apartment, that she knew the contraband was a controlled substance and that knowing such, she exercised care, custody, and control of such contraband.[4/]

There is no more evidence to connect Petitioner to the contraband in this case than there was to connect the Petitioner in the recent case of Flores v. State, 650

[4/] It is often said that "the law does not permit the pyramiding of one assumption upon another because an ultimate fact thus arrived at is too conjectural and speculative to support a judgment," Texas Pacific Coal & Oil Co. v. Wells, 151 S.W.2d 927, 930 (Tex. Civ. App. - Waco, 1941) affirmed Wells v. Texas Pacific Coal & Oil Co., 164 S.W.2d 660 (Comm. App. - Opinion Adopted, 1942). The general rule in criminal law in this respect is that a conviction on circumstantial evidence cannot be sustained upon proof "amounting only to a strong suspicion or mere probability," Brock v. State, 162 Tex.Cr.R. 401, 214 S.W.2d 619, 622 (1948).

S.W.2d 429 (Tex.Cr.App. 1983). In Flores, a number of individuals were present at the residence when it was searched by the police. Contraband was found in the kitchen, the living room, on the floor of the hall, and on the floor of the southwest bedroom. Flores was located in the southeast bedroom in which no contraband was found. No contraband was found on Flores. The State failed to show who owned, possessed, or occupied the residence searched. There was no evidence that Flores owned or rented the residence, paid utility bills for the residence, nor was any clothing or property indicating he lived at the residence found there. There was no evidence of how long Flores had been on the premises or that he had ever been there on any other occasion.

As Judge Dally, writing for the Texas Court of Criminal Appeals in Flores, concluded:

> The evidence does not show that Petitioner either solely or jointly exercised care, control, or management over the methamphetamine found in the residence. The evidence is insufficient to support the conviction... Id. at 430.

The question of whether Petitioner has been convicted upon inadequate evidence is central to the

basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. E.g., Mullaney v. Wilbur, 421 U.S. 684, 697-698 (1975) (requirement of proof beyond a reasonable doubt is not "limit(ed) to those facts which, if not proved, would wholly exonerate" the accused).

The only evidence linking Petitioner to the contraband was her proximity to the location where the marihuana was found.[5/] Evidence which creates no more than a mere suspicion of Petitioner's guilt of the offense charged is insufficient to sustain the conviction. Sinor v.

5/ The record fails to reflect whether Appellant did or did not own, Hineline v. State, 502 S.W.2d 703 (Tex.Cr.App. 1973); lease, Herrera v. State, 561 S.W.2d 175 (Tex.Cr.App. 1978); rent, Cantu v. State, 557 S.W.2d 107 (Tex.Cr.App. 1977); control, Curtis v. State, 519 S.W.2d 883 (Tex.Cr.App. 1975); or occupy, e.g. Carr v. State, 480 S.W.2d 678 (Tex.Cr.App. 1972), the dwelling place in question; she was, of course, on the premises, but all we know about his physical presence is that when the officers went through the front door he was in the living room. Woods v. State, 533 S.W.2d 16 (Tex.Cr.App. 1976) confirms that this is not enough to justify a finding of possession, when as here, "(t)here was no marihuana in plain view in the living room where Appellant was found," Id., at 18.

State, 612 S.W.2d 594 (Tex.Cr.App. 1981).

Similarly, in the instant case, there is no evidence to sustain the decision of the courts below that Petitioner either solely or jointly exercised care, control, or management over the marihauana found in the apartment. The evidence is insufficient to support the affirmance by the courts below of Petitioner's conviction. Sinor v. State, 612 S.W.2d 594 (Tex.Cr.App. 1981); Dubry v. State, 582 S.W.2d 841 (Tex.Cr.App. 1979).

Thus, it is now apparent that the courts below have adopted a settled construction of the Fourteenth Amendment which vitiates this Court's holding in Jackson and Winship. This interpretation of the Fourteenth Amendment by the Texas Court of Appeals and the Texas Court of Criminal Appeals encourages trial courts to violate this Court's holding in Jackson and Winship and guarantees that such violations will be the rule rather than the exception. If this trend is not halted, Texas will regularly violate the Fourteenth Amendment in weighing the sufficiency of the evidence to sustain convictions obtained at criminal trials.

As this Court has noted on numerous occasions, a

person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. Cf. Boddie v. Connecticut, 401 U.S. 371, 377-379 (1971). A meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused. Accordingly, in Thompson v. Louisiana, 362 U.S. 199 (1960), this Court noted that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm.

The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock principle whose enforcement is vital to the administration of criminal law. The requirement of proof beyond a reasonable doubt has this vital role in criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may

lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. As this Court said in Speiser v. Randall, 357 U.S. 513, 525-526 (1958):

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt."

To this end, the reasonable doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' Dorsen & Rezneck, In Re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967). Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.

It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in

doubt whether innocent men are being condemned. It is also important in a free society that every individual going about his ordinary affairs have confidence that the government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty. Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, this Court has explicitly held that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis added).

As such, this Court should not tolerate such repeated and flagrant violations of its holdings in Jackson and Winship as have been committed by the courts below in the instant case.

CONCLUSION

Petitioner prays that this Court grant her petition for writ of certiorari in order to review the decisions by the courts below on the ground that their decisions are contrary to applicable cases decided by this Honorable Court.

Respectfully submitted,

SAMUEL A. GUIBERSON
Attorney for Petitioner
Caridad Valdes Aguilar

2211 Norfolk, Suite 810
Houston, Texas 77098
(713) 520-7200

Dated: December 28, 1984
Houston, Texas

RECORDED: VOLUME 91 PAGE 182 JUDGMENT

MINUTES OF THE 174TH DISTRICT COURT OF HARRIS COUNTY, TEXAS.

MINUTES OF THE 174TH DISTRICT COURT OF
HARRIS COUNTY, TEXAS

AT THE MAY TERM, A.D. 1982

JUDGMENT

NO. 342189

THE STATE OF TEXAS

V. DATE - JUNE 4, 1982

CARIDAD VALDES AGUILAR

Attorney for State: Asst. Dist. Atty. Sid Crowley

Attorney for Defendant: Ken McLean

Offense: Unlawfully, intentionally, and knowingly possessing marihuana in a usable quantity of more than fifty pounds and less than two hundred pounds.

Date of Offense: September 30, A.D. 1981

Plea: Not Guilty

Count and/or
Paragraph: First Paragraph

Plea to Enhancement,
Findings on Enhancement: Not Applicable

Punishment: 6 years confinement in the Texas Department of Corrections.

Sentence to Begin: June 2, 1982

The Defendant having been indicted in the above entitled and numbered cause for the felony offense indicated above, and this cause being this day called for trial, the State appeared by her District Attorney named above, and the Defendant named above, appeared in person and either by counsel as named above or waived counsel as indicated above, and both parties announced and ready for trial. And the Defendant, in person and in writing, in open court, having waived his right of trial by jury, had the indictment read to him, and in open court pleaded not guilty. And after hearing the evidence submitted and arguments of counsel, the Court found the Defendant guilty of the offense indicated above, a felony, and assessed the punishment as confinement in the Texas Department of Corrections for the period indicated above.

It is therefore considered, ordered, and adjudged by the Court that the Defendant is guilty of the offense indicated above, a felony, that the Defendant committed said offense on the date indicated above, that he be punished by confinement in the Texas Department of

Corrections for the period indicated above and that the State of Texas do have and recover of the Defendant all costs of the prosecution, for which execution will issue.

And thereupon the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant, to pronounce sentence against him as follows, to wit: "It is the order of the Court that the Defendant, named above, who has been adjudged to be guilty of the offense indicated above, a felony, and whose punishment has been assessed at confinement in the Texas Department of Corrections for the period indicated above, be delivered by the Sheriff of Harris County, Texas, immediately to the Director of Corrections of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Department of Corrections for the period indicated above in accordance with the provisions of the law governing in the Texas Department of Corrections."

The said Defendant was remanded to jail until said Sheriff can obey the directions of this sentence.

Signed and entered on this the 4th day of June, A.D. 1982.

Jon R. Hughes
Judge, 174th District Court
of Harris County, Texas

To which action of the Court the Defendant then and there, in open Court excepted and gave notice of appeal to the Court of Appeals in the State of Texas, Houston, Texas.

And inasmuch as the Defendant has given notice of appeal herein, execution of sentence is ordered to await the order of our Court of Appeals in this behalf.

Appeal bond is set in the amount of $1500.00.

AFFIRMED 30 NOVEMBER 1983

NO. 10-83-092-CR

Trial Court #342189

IN THE

COURT OF APPEALS

FOR THE

TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT WACO

* * * * * * * * * * * * * *

CARIDAD VALDES AGUILAR,
Appellant

V.

THE STATE OF TEXAS,
Appellee.

* * * * * * * * * * * * * *

From the 174th Judicial District Court
Harris County, Texas

* * * * * * * * * * * * * *

OPINION

* * * * *

This is an appeal by defendant Aguilar from conviction for possession of marihuana of more than 50 and less than 200 pounds for which she was sentenced to 6 years in the Texas Department of Corrections.

On September 30, 1981 officers Jordan and Oatis executed a search warrant at 131 West Parker, Apartment 1121 in Houston, pursuant to an informer's claim that a large amount of cocaine was located on the premises. After knocking on the door of the apartment, the officers someone look out the window but would not open the door. The officers forced the door and found defendant Aguilar, her co-defendant Vergara and twc or three children inside. Oatis testified he found a number of bags of a green substance in the closet of the bedroom and he detected the odor of marihuana once he opened the door. The substance turned out to be 9 bags and 2 boxes of marihuana weighing 148 pounds. Also recovered were numerous pills, capsules, tablets and a bag containing white powder; also a letter from the Texas Department of Human Resources addressed to defendant at the address named in the search warrant.

Trial was to the court without a jury which found defendant guilty and assessed punishment at 6 years.

Defendant appeals on 2 Grounds of Error.

Ground 1 asserts the evidence insufficient to support defendant's conviction.

Proof of possession may be shown by direct or circumstantial evidence. Collini v. State, Ct.Crim.Appls, 487 S.W.2d 132. The evidence must affirmatively link defendant to the marihuana in such a manner and to such an extent that it may reasonably be inferred she knew of its existence and whereabouts and that she exercised care, custody, control or management over it. Dubry v. State, Ct.Crim.Appls, 582 S.W.2d 841. In the case at bar 148 pounds of marihuana were in the apartment; defendant was present in the apartment and would not open the door though the police knocked; correspondence addressed to defendant was in the apartment; and no other person was shown to occupy or control the apartment.

We think the evidence sufficient to sustain defendant's conviction. Ground 1 is overruled.

Ground 2 asserts the trial court erred in admitting into evidence marihuana seized pursuant to an illegal search.

Defendant challenges the sufficiency of the recitations in the officer's affidavit upon which the search warrant was issued asserting same insufficient under the "two-pronged test" prescribed in Aguilar v. Texas, 378 U.S. 108. The search warrant states that defendant and one Vergara at the apartment and address entered, possessed marihuana and that the affiant's belief in the above is based on the following facts: "On this date * * I * * the affiant received information from a credible and reliable informant that a male * * named Vergara * * and [defendant] a female * * have in their possession a quantity of marihuana for sale. The informant stated that within the past 24 hours the informant has been inside this apartment and saw a quantity of marihuana in large plastic bags. The informant has seen marihuana on many occasions and can recognize it by sight * * The informant has furnished the affiant with information regarding illegal narcotic activity on 3 prior occasions and each time the information proved true and correct.

The affidavit stated the informant had seen the marihuana inside the apartment; that the informant could recognize marihuana by sight; and that the informant has furnished the affiant correct information on other occasions; and is sufficient under Curtis v. State, Ct.Crim.Appls, 519 S.W.2d 883 and Winkles v. State, Ct.Crim.Appls, 634 S.W.2d 289.

Moreover, the U.S. Supreme Court in Illinois v. Gates (decided 8 June 1983), disapproved the legal test of Aguilar v. Texas, 378 U.S. 108 and replaced same with a "totality of the circumstances" test in which the reliability and credibility of the informer and his basis of knowledge are considered as intertwined considerations that may illuminate the probable cause issue. The facts in this case meet that test.

Ground 2 is overruled.

AFFIRMED
FRANK G. MCDONALD
Chief Justice

DO NOT PUBLISH

COURT OF APPEALS
TENTH SUPREME JUDICIAL DISTRICT
WACO, TEXAS

I, ROBERT G. WATTS, Clerk of the Court of Appeals for the Tenth Supreme Judicial District of Texas, at Waco, hereby certify that the foregoing 3 page(s) contain(s) a true and correct copy of the Opinion filed in said Court on the 30th day of November, 1983,in the following numbered and entitled cause, to wit:

CARIDAD VALDES AGUILAR,

Appellant,

NO. 10-83-092-CR

THE STATE OF TEXAS,
Appellee.

on appeal to said Court from Harris County, Texas.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT, at office in Waco, this 30th day of November, 1983.

ROBERT G. WATTS,

Clerk

COURT OF APPEALS
TENTH SUPREME JUDICIAL DISTRICT
P.O. BOX 1606
WACO, TEXAS 76703-1606

November 30, 1983

Below is the judgment in the numbered cause set out herein to be entered in the Minutes of this Court as of the 30th day of November, 1983.

10-83-092-CR CARIDAD VALDES AGUILAR v. STATE OF TEXAS - ON APPEAL FROM 174TH DISTRICT COURT OF HARRIS COUNTY - AFFIRMED - Opinion by Chief Justice McDonald:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

FRANK G. MCDONALD, Chief Justice
VIC HALL, Associate Justice
BOB L. THOMAS, Associate Justice

ROBERT G. WATTS, Clerk
TELEPHONE (817) 753-7341

COURT OF APPEALS
TENTH SUPREME JUDICIAL DISTRICT
P.O. BOX 1606
WACO, TEXAS 76703-1606

December 29, 1983

Honorable Diantha Garrett Brennan
Guiberson Law Offices
2211 Norfolk, Suite 810
Houston, Texas 77098

Honorable John B. Holmes, Jr.
District Attorney
201 Fannin, Suite 200
Houston, Texas 77002

Re: Cause No, 10-83-092-CR, Caridad Valdes Aguilar v. State of Texas, From: Harris County

Dear Attorney:

Appellant's Motion for Rehearing in the above cause was overruled on December 29, 1983, in the following words:

"It is overruled that Appellant's Motion for Rehearing be, and hereby is overruled."

Very truly yours,

Robert G. Watts, Clerk

RGW:lk

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

RE: Case No. 0213-4
STYLE: Aguilar, Caridad Valdes

May 23, 1984

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

MAIL TO: Diantha Garrett Brennan
2211 Norfolk, Suite 810
Houston, Texas 77098

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

RE: Case No. 0213-4
STYLE: Aguilar, Caridad Valdes

October 31, 1984

On this day, the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITOL STATION
AUSTIN, TEXAS 78711

MAIL TO: Diantha Garrett Brennan
2211 Norfolk, Suite 810
Houston, Texas 77098

FRANK G. MCDONALD, Chief Justice
VIC HALL, Associate Justice
BOB L. THOMAS, Associate Justice

ROBERT G. WATTS, Clerk
TELEPHONE (817) 753-7341

COURT OF APPEALS
TENTH SUPREME JUDICIAL DISTRICT
P.O. BOX 1606
WACO, TEXAS 76703-1606

November 29, 1984

Honorable Diantha Garrett Brennan
Cuiberson Law Offices
2211 Norfolk, Suite 810
Houston, Texas 77098

Honorable John B. Holmes, Jr.
District Attorney
201 Fannin, Suite 200
Houston, Texas 77002

Re: Cause No, 10-83-092-CR, Caridad Valdes Aguilar v. State of Texas, From: Harris County

Dear Attorney:

Appellant's Motion to Stay Execution of Mandate in the above cause was denied on November 29, 1984 in the following words:

"It is ordered that Appellant's Motion to Stay Execution of Mandate be, and hereby is, denied"

The Mandate in the above cause was issued on November 29, 1984.

Very truly yours,
Robert G. Watts, Clerk
Imogene Allen, Deputy

AFFIDAVIT OF SERVICE BY MAIL

State of Texas §
County of Harris §

I, Diantha Garrett Brennan, depose and say that I am an attorney in the office of Samuel A. Guiberson, attorney of record for Caridad Valdes Aguilar, Petitioner herein, and that on this the 28th day of December 1984, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the above and foregoing Petition for Writ of Certiorari on each of the parties required to be served herein, as follows:

On Mr. John B. Holmes, District Attorney, counsel for the State of Texas, Respondent, by mailing the copies in a duly addressed envelope, by certified mail, return receipts requested, to the District Attorney's Office, Appellate Division, 301 Fannin, Houston, Texas, 77002.

On Mr. Robert Huttash, counsel for the State of Texas, Respondent, by mailing the copies in a duly addressed envelope, by certified mail, return receipts requested to the State Prosecuting Attorney's Office, Supreme Court Building, P.O. Box 12405, Austin, Texas 78711.

All parties required to be served have been served.

Diantha Garrett Brennan

Diantha Garrett Brennan

BEFORE ME, the undersigned authority, on this day personally appeared Diantha Garrett Brennan, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purpose and considerations therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 28th day of December, 1984.

Janice Barlow

NOTARY PUBLIC IN AND
FOR THE STATE OF
TEXAS

My commission expires:

JANICE BARLOW
Notary Public in and for the State of Texas
My Commission Expires 10-27-87